LEGISLATIVE ASSEMBLY OF ALBERTA
INTERNSHIP PROGRAM PAPER

CONFLICTS OF INTEREST:
WHAT ARE THE LIMITS, AND WHO DECIDES

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Introduction

Conflict of Interest legislation and guidelines have become a very popular mechanism to ensure and maintain public confidence in all three levels of government in Canada. For years, those who have implemented public policy, the bureaucracies, have been subject to a code of ethics or professional conduct. Only recently, due to public pressure resulting from a few high profile cases of ministerial misconduct, have legislators been called on to impose similar rules of ethical conduct on themselves. Canada is not alone in its efforts to ensure the impartiality of its civil servants and elected officials. Other democracies, including Great Britain, Australia and the United States, have addressed the issue of ethical conduct and conflict of interest of both bureaucrats and elected officials.

The legislative history behind Conflict of Interest legislation in Canada is brief. However, within the Criminal Code of Canada, there are provisions for breach of trust and misuse of public office. As well, legislatures throughout the Dominion have specific provisions within their Legislative Act's and Standing Order's dealing with conflict of interest. It will be the object of this paper to focus solely on Conflict of Interest legislation in terms of Alberta's response in implementing such legislation for Members of it's Legislature.

Defining Conflict of Interest

It is not reasonable to expect that individuals seeking public office should divest themselves of all financial assets and or interests in private or public business ventures. However, as a legislator, an individual may be called on to support, endorse or enact certain legislation which may result in some form of personal gain and place the individual in a definite conflict of interest. A conflict of interest may also arise out of an individual carrying out what he/she believes to be an appropriate business practice such as excepting gifts, complimentary travel, using travel mile points, etc. These are instances where the potential for a conflict of interest may exist. Because of the varying instances in which conflict of interest may exist, it is necessary to determine what the definition for conflict of interest is or is meant to be.

For the purposes of this paper, and the broader and more general purpose of understanding the full scope of any potential conflict of interest situation, a clearly defined and accepted definition of conflict of interest and its various types will be detailed in the following section. In looking at the Federal conflict of interest provisions, Justice W.D. Parker, in his final report into the Sinclair Stevens affair, made several key recommendations of which one included the requirement for clearly written conflict of interest definitions.

> I recognize that, for the vast majority of public office holders, conflict of interest has a common sense meaning that does not require extensive definition. The mingling of private and public business, for example, clearly involves a conflict of interest and is wrong by any measure. Some conflict of interest problems, however, are not as black and white. For the grey areas, which require subtle judgements, a clearly written and easily understood definition is needed. Both for reasons of definition and education, and for ease of compliance, conflict of

interest should be defined.[1]

The definition of conflict of interest, a "situation in which a (legislator) has a personal or private pecuniary interest sufficient to influence, or appear to influence the exercise of his(her) public duties and responsibilities"[2], deals with both **real** and **apparent** conflicts of interest. It is in this sense that we understand the complexities behind defining, in any real sense, what exactly conflict of interest means. The one constant that emerges in any definition of conflict of interest is the "pecuniary" or monetary gain by an individual.

Actions motivated by psychological or emotional rewards could also be considered as undue influences on an individuals public duties and responsibilities. There can be no real moral or ethical value placed on the difference between pecuniary motives versus psychological or emotional motives, however the later are much more difficult to identify and far more difficult to quantify. It is for this reason that the foundation for any definition is based on a conflict between public duty versus private pecuniary interests.[3] Having arrived at a definition for conflict of interest, we

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[1]Government of Canada, Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens (The Parker Commission). Ottawa:Supply and Services, 1987, p.348.

[2]Honourable Allan J. MacEachern, Members of Parliament And Conflict of Interest, Ottawa, Information Canada, 1973, p.1 as taken from John McDonough, Background Paper - Conflict of Interest: Legal, Ethical and Political Dimensions, Edmonton, Legislative Research Services, 1986, p.4.

[3]Sandra Williams, Conflict of Interest: The Ethical Dilemma in Politics. Aldershot, England: Gower Publishing Company Ltd, 1985. p.6.

must now define the various types of conflict of interest which have been identified. In listing the various types of conflict of interest, one's observation must be tempered by the reality, that conflict of interest is not a static concept. What may be considered a conflict of interest today may not have been considered as such in the past. Similarly, what is not considered conflict of interest today, may be considered as such in the future. As we have already seen with our definition, the difference between pecuniary, psychological and emotional motivation and reward may someday not be so different and cast in the same light.

The first type of conflict of interest to be defined will be that of a **real** conflict of interest. The definition for real conflict of interest is almost identical to that established earlier in this section, however conditions or prerequisites are included so as to make a distinction from the other defined types which will follow. Justice W.D. Parker listed three prerequisites which he determined needed to be present for a real conflict of interest to exist. They were:

1. The existence of a private interest;
2. that is known to the public office holder; and
3. that has a connection or nexus with his or her public duties or responsibilities that is sufficient to influence the exercise of those duties or responsibilities.[4]

Justice Parker elaborated on this definition by making the distinction between the decision making process and any situation in which a public official is discharging the duties of his/her office. Justice Parker placed the basis for real conflict of interest

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[4]Government of Canada, Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens (The Parker Commission). Ottawa: Supply and Services, 1987, p.25.

on the situation in which the public official is carrying out his/her public duties, not merely on the decision making process. More specifically however, Justice Parker established the scrutiny for conflict of interest to be that of any exercise of a public official of his or her official duties and responsibilities.[5] The foundation for this definition concurs with that of the definition for conflict of interest which has already been established previously in this paper.

The second type of conflict defined in this paper will be that of a **potential** conflict of interest. Justice Parker has defined potential conflict of interest to be:

> Where the public office holder finds his or herself in a situation in which the existence of some private economic interest could influence the exercise of his or her public duties and responsibilities, the public office holder is in a potential conflict of interest provided that he or she has not yet exercised such duty or responsibility.[6]

Potential conflict of interest is the moment of reflection at which point a public office holder realizes that he or she has private economic interests which may benefit from the exercise of his or her public duties and responsibilities. The criteria for potential conflict of interest is an awareness of the possibility for a real conflict of interest to develop and at such point any and all actions to remove one's self from the potential conflict must be carried out. There exists a very grey area between potential conflict of interest and real conflict of interest, one divided only by action or lack thereof.

The third and final type of conflict of interest is an **apparent** conflict of interest,

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[5]Ibid. p.29.

[6]Ibid, p.29.

as defined by the Parker Commission to mean:

> an apparent conflict of interest exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists.[7]

More specifically, "an apparent conflict of interest is one which is deduced from appearances".[8] Even though no actual wrong doing takes place, an individual may perceive that a conflict of interest exists. If an apparent conflict of interest is perceived to exist in the eyes of those who are governed, then the process of government has been tainted as great as if a real conflict of interest had occurred.

In their various forms, conflict of interest definitions attempt to deal with those situations which could place any member of a legislature in a conflict of interest situation as a result of carrying out very general or specific duties. **Real** conflict of interest deals with specific actions taken by an individual resulting in a monetary gain of some sort. **Potential** conflict of interest creates certain grey areas which arise after an individual realizes that certain actions (not yet taken) may result in a real conflict of interest. This moment of awareness is the dividing line between these two types of conflict of interest. At this point, an individual must withdraw completely from the situation to avoid a real conflict of interest from developing. To no fault of the member, an **Apparent** conflict of interest can have as much of a damaging affect on the process as a real conflict of interest. It is for this reason that we need to address

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[7]Ibid, p.32.

[8]Kenneth Kernaghan and John W. Langford, The Responsible Public Servant. Halifax: The Institute for Research on Public Policy, 1990, p. 136.

these type of assumptions in the same manner as the more serious real conflict of interest. If those who are governed believe a conflict of interest really exists, it can have a very damaging effect on the member and the legislative process he/she participates in.

Alberta's Response

Alberta's response to conflict of interest guidelines and legislation began during the Manning era with a statement regarding the conduct of members of the Executive Council. It did not deal specifically with MLAs other than those members who were Ministers in the Manning Socred government. However, this was only a statement and had very little weight in terms enforcement other than potential legal action initiated under the Criminal Code of Canada. Aside from the Criminal Code of Canada and its sections dealing with defrauding the government (section 110 [1],[2],[3]) and breach of trust (section 111), no specific legislation (other than standing orders and Legislative Assembly Act) or regulations existed prior to 1973.

In 1971, after defeating the Manning Socred government, Premier Peter Lougheed required all members of Executive Council to submit a statement of assets and liabilities so as to clarify their private holdings and prevent the potential of any conflicts arising. In 1973 Premier Lougheed announced by Ministerial statement that all members of Executive Council would be required to file a statement of assets and liabilities with the Clerk of the Legislative Assembly of Alberta. The Premier's statement also restricted members of Executive Council from owning shares, directly

or indirectly, in any public company doing business with the Alberta government. In making his statement in the Legislature he cited a case of ministerial misconduct and the subsequent response by Ontario Premier Davis as his motivation for making disclosure of assets and liabilities by Executive Council a policy of his government.

> ..although there was no particular reason or call for similar action in Alberta, I nevertheless felt the approach had merit because it would assure the public that there would be full public knowledge of a Minister making or participating in a government decision which might conflict with his[her] personal interests. It also appeared from assessing the Ontario incident that such public disclosure would significantly reduce the probability of a Minister inadvertently making a decision involving a proprietory or business interest with he or she was involved.[9]

Premier Lougheed also expressed a concern over the lack of similar requirements for senior bureaucrats within the Alberta pubic service and in 1975 extended the scope of public disclosure to include Deputy Ministers and Senior Public Servants. Further to this, in 1977, the Government of Alberta tabled in the Legislative Assembly a proposed Code of Conduct and Ethics for Alberta's public service. In terms of any regulations or guidelines for MLAs other than members of Executive Council, no specific provisions existed for Conflict of Interest or Code of Ethics.

Discussions regarding Conflict of Interest legislation did not reach the floor of the Alberta Legislature again until the spring of 1987 when Sheldon Chumir's Motion 201, dealing with the accountability, openness and responsibility of government was discussed. It read as follows;

Be it resolved that the Legislative Assembly urge the government to take steps

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[9]Government of Alberta. Ministerial Statement by Premier Peter Lougheed, Statement on Public Disclosure of Interest. May 2, 1973. pp. 1.

> to increase the confidence of the public in government and enhance the openness of government and the accountability and responsibility of elected representatives by introducing legislation.....
> 4) to provide clear and enhanced rules and procedures governing conflict of interest for cabinet ministers, Members of the Legislative Assembly, civil servants, and those serving on government boards and other bodies performing government functions.[10]

Mr. Chumir's motion did not get the support of the House, however it was successful in having the issue brought to the floor and to the attention of Alberta legislators.

In 1989 due to several alleged cases of conflict of interest involving Members of the Legislative Assembly, Premier Don Getty issued Order in Council 425/89 establishing the Conflict of Interest Review Panel. Its mandate was;

> a) to review Alberta legislation and guidelines that relate to conflict of interest rules applicable to Members of the Executive Council, Members of the Legislative Assembly and senior public servants in Alberta;
> b) to review in particular the ownership by Members of the Executive Council, Members of the Legislative Assembly and senior public servants of shares of the Alberta Energy Company Ltd.;
> c) to comment and make recommendations based on its findings.[11]

In February of 1990, the Review Panel submitted its final report to the Premier. As directed within its terms of reference, the review panel made several comprehensive recommendations aimed at establishing an effective mechanism through which conflicts of interest by all Members of the Legislative Assembly could be addressed.

Public affairs have become more complex. The public has become less willing

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[10]Alberta Hansard. Sheldon Chumir - Motion 201. March 1987, pp.53.

[11]Lieutenant Governor in Council, Order in Council 425/89.

> to accept official assurances of the integrity of government institutions. In the Review Panel's opinion, these circumstances make it imperative that Alberta adopt a more extensive conflicts of interest system, including both rules and administrative capability, than that which now exists.[12]

The Review Panel identified as one of the fundamental principals for establishing a comprehensive conflicts of interest system, the legitimacy of the legislative process in the eyes of all Albertans. The panel's recommendations involved making amendments to the Legislative Assembly Act so as to enhance provisions dealing with disqualification, as well as the establishment of an Ethics Commissioner as an officer of the Legislative Assembly to oversee and implement the appropriate legislative provisions.

The Review Panel's recommendations involved such issues as a statement of ethical principles, disclosure of financial interests, economic activities of ministers and MLAs, the potential for trust arrangements, and other administrative and procedural functions for the proposed Ethics Commissioner. The Review Panel included within its report a draft bill detailing specific provisions and amendments to the Legislative Assembly Act. It was the panel's intention, through its final report, to provide Albertans and MLAs with a focal point upon which future discussions could take place so as meaningful reforms could be made to the current legislative provisions.

As a direct result of this report, the Attorney General for the Province of Alberta, the Honourable Ken Rostad, tabled *Bill 40 - Conflicts of Interest Act* in the Alberta

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[12]Government of Alberta, Conflicts of Interest Review Panel. Report on Conflicts of Interest Rules for Cabinet Ministers, Members of the Legislative Assembly and Senior Public Servants. February 1990, pp.32.

Legislature in the spring of 1991. Bill 40 called for the establishment of an Ethics Commissioner as an officer of the Legislative Assembly. The bill dealt specifically with the obligations of Members, disclosure of financial interests, members of Executive Council, investigation of breaches, former ministers, and the position of the Ethics Commissioner. Bill 40 received Royal Assent on June 25, 1991 and the province of Alberta became one of three jurisdictions in Canada to have, as an officer of the Assembly, an Ethics Commissioner.

Conclusion

To discuss in great deal any of the specific provisions within Alberta's conflict of interest legislation would require volumes. It would however, be beneficial to make a few general comments regarding the conflict of interest legislation in Alberta.

In passing the Conflicts of Interest Act, the legislative assembly did not include definitions for the three types of conflict of interest. It instead detailed the specific obligations of members in regards to various actions including influence, insider information, contracts with the crown, etc.. Instead of establishing a conceptual framework composed of first principles which would address conflict of interest in its simplest form the new Conflicts of Interest Act deals with specifics. Justice Parker and others, including the conflicts of interest review panel, acknowledged the need for concise definition of the problem. It will be very interesting to see if this new Conflicts of Interest Act will stand up the intense scrutiny it will be placed under, and if the established obligations of members will be adequate to address those grey areas

which will undoubtedly arise.

In conclusion, conflicts of interest legislation is the product of mistrust and non-confidence in public officials as a result of several high profile cases of abuse of office within Alberta and the rest of Canada. In this case, the actions of a small number have placed the noble and honourable profession of public service in question. For the Legislative Assembly of Alberta, and any other jurisdiction, to have the confidence of those they govern, they must take measures to ensure their credibility and integrity. Conflicts of Interest legislation can guarantee that everybody knows what the obligations are through education, and that appropriate measures can be taken through investigation and penalty should a case of conflict of interest arise. The Legislative Assembly of Alberta has responded. We will all know the real worth of that response when, and if, a conflict of interest arises.